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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1983

No. 83-656

CARIBE TUGBOAT CORPORATION
AND CROWLEY TOWING
and TRANSPORTATION COMPANY,

Petitioners,

vs.

DANIEL T. DUFFY,

Respondent.

Reply of Petitioners in Support of Petition for Writ of Certiorari

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and

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QUESTION FOR REVIEW

Whether a state forum in adjudicating a maritime and Jones Act claim must adhere to explicit law established by the Supreme Court of the United States.

LIST OF THE PARTIES

The parties, with reference to their status at the Trial Court are:

1. Petitioners - Caribe Tugboat Corporation and Crowley Towing and Transportation Company, Defendants.

   Crowley Maritime Corporation is the parent corporation of Petitioners.

2. Respondent - Daniel T. Duffy, Plaintiff.

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ARGUMENT
I

CERTIORARI[1] IS NECESSARY TO CORRECT THE FLORIDA COURT'S ERRONEOUS APPLICATION OF THE FLORIDA HARMLESS ERROR STATUTE

Respondent asserts that the First District Court of Appeal's decision is not reviewable, because the Florida Harmless Error Statute determined that the failure to charge *Liepelt*[2] was not prejudicial to Petitioner[3]. Respondent reasons that this constitutes a "separate and independent state ground" for the decision. However, in each of the cases cited by Respondent[4], the federal and state issues were co-existent: the state court could have chosen either ground to decide the case. Here, the federal and state laws are mutually exclusive: the state court did not have the luxury of choosing which to apply; either state harmless error law applies or federal harmless error law applies. Deciding whether state or federal law applies to a particular issue has never been an impediment to this Court's jurisdiction *Cf. Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

It is, therefore, necessary for this Court to take another step to implement *Liepelt*. Having directed the Texas Court of Civil Appeals in *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 488 (1981) to determine whether the failure to apply *Liepelt* is

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[1] Respondent is correct that the Writ of Certiorari should run to the Florida First District Court of Appeal. *Virginian Ry. v. Mullens*, 271 U.S. 220, 222 (1926). Petitioner apologizes for this inadvertant error. Respondent has agreed that this error is not dispositive of this Court's jurisdiction (Respondent's Brief at 4). Therefore, Petitioner presumes Respondent agrees to amend the Petition to Provide for the Writ of Certiorari to run to the Florida First District Court of Appeal.

[2] *Norfolk & Western Ry. v. Liepelt*, 444 U.S. 490 (1980).

[3] The Florida First District Court of Appeal's decision does not make it clear whether that Court decided this issue on state or federal grounds. *See* Petitioner's Brief for Writ of Certiorari, A-13, 14.

[4] *Wainwright v. Sykes*, 433 U.S. 72 (1977); *Jankovich v. Indiana Toll Road Comm.*, 379 U.S. 487 (1965); *Herb v. Pitcairn*, 324 U.S. 117 (1945); *Fox Film Corp. v. Muller*, 296 U.S. 207 (1935).

"harmless error," it is respectfully submitted that this Court must now direct the Florida State Courts to apply the federal harmless error law to *Liepelt*. It is imperative that this Court take this step now, as the United States Court of Appeals in which Florida is located, has in each case so far decided, found failure to charge *Liepelt* to be prejudicial [5].

It is clear that the federal harmless error standard must apply [6]. *McCandless v. United States*, 298 U.S. 342 (1936). The actual wording of the Federal Harmless Error Statute defines "harmless error" as those "errors or defects which do not affect *the substantial rights of the parties*," 28 U.S.C.A. §2111 (1982) (emphasis added), thus leaving no doubt that determination of harmlessness is one of substance requiring application of federal law to a federal case, regardless of forum. *See Garrett v. Moore-McCormack Co.*, 317 U.S. 239 (1942).

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[5] *O'Byrne v. St. Louis Southwestern Ry.*, 632 F.2d 1285 (5th Cir., Unit A, 1980); *Lang v. Texas & Pacific Ry.*, 624 F.2d 1275 (5th Cir. 1980). The former Fifth Circuit was divided into two units some time prior to its present division. The first decision of the United States Court of Appeals for the Eleventh Circuit was to adopt as governing law the Fifth Circuit body of precedent. *Bonner v. City of Prichard, Alabama*, 661 F.2d 1206 (11th Cir. 1981); *see also Kingston Shipping Co v. Roberts*, 667 F.2d 34 (11th Cir. 1982).

[6] A litany of this Court's cases supports application of the federal harmless error rule. For example, federal law controls as to the measure of damages, *Messel v. Foundation Co.*, 274 U.S. 427 (1927); as to the standard of care in Jones Act cases, *Ferguson v. Moore-McCormack Lines, Inc.*, 352 U.S. 521 (1957); as to the validity of releases under the Federal Employees' Liability Act, *Maynard v. Durham & Southern R.R.*, 365 U.S. 160 (1961); as to the burden of proof, *New Orleans & N.E.R.R. v. Harris*, 247 U.S. 367 (1918); and as to the sufficiency of evidence, *Garrett v. Moore-McCormack Co.*, 317 U.S. 239 (1942).

II.

THE TRIAL COURT'S ERROR WAS PREJUDICIAL

This Court has set forth the federal test for harmless error:

> And of course in jury trials erroneous rulings are *presumptively injurious*, especially those embodied in instructions to the jury; and they furnish ground for reversal unless it *affirmatively appears* that they were harmless.

Fillippon v. Albion Vein Slate Co., 250 U.S. 76, 82 (1919) (emphasis added). *See also Bihn v. United States*, 328 U.S. 633 (1946); *McCandless v. United States*, 298 U.S. 342 (1936).

This case bears a striking similarity to *United States v. River Rouge Improvement Co.*, 269 U.S. 411 (1926), a partial condemnation proceeding, wherein the trial judge erred in instructing the jury on the amount of benefit that should be deducted from the riparian owners' award, after a partial condemnation[7]. The trial judge overemphasized the contingent character of the rights of the riparian owners, instructing the jury that those property rights were conditioned on Government largesse.

The Circuit Court in *River Rouge* believed this error to be harmless. However, this Court reversed, reasoning that the failure to observe the distinction between owners' riparian rights, which are subject to Government regulation, as opposed to rights which emanated from the Government,

[7] In order to transfer a narrow, binding, comparatively shallow Rouge River, which had previously been incapable of accomodating large freighters, into a long slip serving numerous docks and industries and accomodating the largest freighters on the Great Lakes, the United States Government partially condemned certain riparian lands to widen and thereby straighten the Rouge River. *Id.* at 414-15. As the riparian owners whose land was only partially condemned arguably had the value of their remaining lands enhanced by the partial condemnation, the United States sought to reduce their damages to the extent of that enhancement or "benefit" pursuant to the River and Harbor Act of July 18, 1918, 40 Stat. 904.

created the impression that the riparian rights were more contingent than they really were. This led the jury to devalue the land excessively, lower the estimate of the benefits resulting from the partial condemnation, and award excessive damages.

In *River Rouge*, the trial judge misled the jury as to the effect of the Government's "taking" which caused the jury to overcompensate the riparian owners. Here, the trial judge misled the jury as to the Government's inability to "take" taxes from Mr. Duffy's award, causing the jury to overcompensate him.

Moreover, the presumption of prejudice cannot be rebutted in this case as there is a preponderant probability the jury did consider the effect of income taxes on the award. The Plaintiff was awarded $400,000 for a broken ankle, even though he was earning a higher income, after the accident, than he had earned before the accident. He lost only $21,000 in wages. All of his medical expenses, to date, have been paid.

The thrust of plaintiff's jury argument was the possible future medical expenses, which might be incurred by Plaintiff for ankle surgery. The consensus of the testifying physicians was that a surgical procedure would not be necessary for another five to ten years. Certainly, such surgery would not cost $400,000. Further, in five to ten years, the $400,000 would be worth substantially more.

Looking at the record in this case, it is likely that the jury wanted the plaintiff to obtain $200,000 and thus awarded $400,000 with the thought that the award would be taxed at a 50% rate. It therefore does not affrimatively appear that the error was harmless. *McCandless v. United States, supra; Fillipon v. Albion Vein Slate Co., supra.*

CONCLUSION

It is respectfully submitted that this Court should remand this case to the First District Court of Appeal, Florida for instructions to the trial court to retry the damages in this case or to effect a remittitur.

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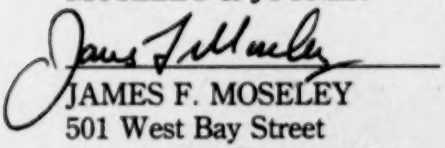

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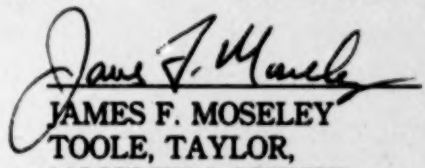
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Mr. Robert L. Cowles, Cowles, Coker, Myers, Schickel & Pierce, P.A., at Post Office Box 1860, Jacksonville, Florida 32201 by United States Mail this 22nd day of December, 1983.



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